IN THE HIGH COURT OF JUDICATURE AT BOMBAY
O. O. C. J.
WRIT PETITION NO.2787 OF 2005
WITH
NOTICE OF MOTION NO.33 OF 2006

Novartis India Ltd. ..Petitioner.

Vs.

Sarabjeet S. Singh ..Respondent.

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Mr. J.P. Cama, Senior Advocate with Ms. S.V. Kher with Mrs. Sarika Deshpande and Ms. Sushma Joshi i/b M/s. Haresh Mehta & Co. for the Petitioner.

Ms. Nayana Buch with Ms. Bina Dholakia with Mr. Shailesh More for Respondent No.1.

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CORAM: DR. D.Y. CHANDRACHUD, J.
21st December, 2006.

ORAL JUDGMENT :

1. An award of the Industrial Tribunal on a complaint filed by the Respondent under Section 33-A of the Industrial Disputes Act, 1947 has been called into question in these proceedings under Article 226 of the Constitution. Principally the issue which arises before the Court for consideration is whether the Respondent can be regarded as “a workman concerned in such dispute” within the intendment and meaning of those words in Section 33(2) of the Industrial Disputes Act, 1947. The First Respondent was engaged as a Medical Sales Representative on 29th August, 1985 by the

Petitioner and was posted at New Delhi. By an order dated 26th September, 1995, the workman was transferred from New Delhi to Ratlam. The workman did not accept the order of transfer. On 1st November, 1995 the services of the workman came to be terminated by the management. The workman then instituted a complaint under Section 33-A of the Industrial Disputes Act, 1947. The case of the workman was that he was a member of the Association of Chemical Workers and was governed by the conditions of the previous settlement dated 8th August, 1990, which had since expired on 30th June, 1992. Upon the charter of demands of the union having been taken into conciliation, the Commissioner of Labour had submitted a report of failure upon which the State Government referred the demands for adjudication by the Industrial Tribunal. One of the demands, it was submitted related to transfers, the demand being that save and except for mutual transfers with the consent of the sales and medical representatives concerned, no other transfer shall be carried out. The management filed its written statement stating that the Association of Chemical Workers could not have espoused the cause of medical representatives inasmuch as during the material time not even a single employee in that category was a member of

the union within the metropolitan area of New Delhi.

2. The Industrial Tribunal dismissed the complaint upon which the workman filed a petition under Article 226 before this Court. By an order dated 4th March, 2005, the Petition was disposed of upon a statement made by the learned counsel appearing on behalf of the management and the workman that the order of the Industrial Tribunal be quashed and set aside and the Tribunal be directed to reconsider the complaint. The workman was granted liberty to prove his case in the application under Section 33-A by leading evidence or by producing relevant documentary material before the Tribunal.

3. After the order of remand passed by this Court, the workman and the management adduced evidence before the Industrial Tribunal. The Tribunal by its order dated 30th June, 2005 allowed the complaint and came to the conclusion that there was a contravention of the mandatory provisions of Section 33 (2)(b) of the Industrial Disputes Act, 1947. The Tribunal held that all the medical representatives in India were covered by the earlier settlement dated 8th August, 1990. The conciliation proceedings

that followed upon the expiry of the settlement and the reference to the Industrial Tribunal for a revision of the conditions of service had, according to the Tribunal a nexus with the earlier settlement. The Tribunal held that since the management had taken action during the pendency of the reference, compliance with the provisions of Section 33(2)(b) was mandatory and the failure to do so would result in the order of termination being nonest. The complaint was accordingly disposed of.

4. In assailing the correctness of the order of the Industrial Tribunal, counsel appearing on behalf of the management submitted that (i) In the present case, the reference was made on 25th September, 1995, five months prior to which the workman had tendered his resignation on 25th April, 1995 as a member of the Association of Chemical Workers; (ii) The workman admitted having signed the letter of resignation; Though the case of the workman was that the letter had been obtained by the management by compulsion, there was no evidence in support thereof. The letter of resignation was admittedly signed by the workman and the workman admitted that he had not withdrawn the letter at any stage; (iii) Neither the workman nor the union had

adduced any evidence on the payment of the membership subscription or dues of the union; (iv) The Association of Chemical Workers which raised the dispute had no membership whatsoever in the category of medical representatives; (v) Novartis Employees Union had raised a dispute in regard to the conditions of service of Medical Sales Representatives and the demand raised by the union was settled in conciliation proceedings upon which a settlement came to be signed; and (vi) The Respondent had failed to establish in any event that he was a member of the Association of Chemical Workers. He was therefore not a workman concerned with the reference.

5. On the other hand it was urged on behalf of the Respondent that Section 33(2)(b) postulates a workman concerned in such dispute during the pendency of an industrial dispute. The Association of Chemical Workers had entered into an earlier settlement in respect of the category of Medical Sales Representatives and upon the termination of the earlier settlement had presented a charter of demands. Hence, it was submitted that when the reference was made by the appropriate government to the Industrial Tribunal, the workman was concerned in the

industrial dispute. In sum and substance, the submission was that the only condition requisite to the applicability of Section 33(2)(b) is that a reference should be pending and the employee must be concerned in the reference. The question as to whether an employee is concerned in the dispute, it was submitted, is a mixed question of law and fact.

6. Section 33(2) of the Industrial Disputes Act, 1947 provides thus :

> "33(2) During the pendency of any such proceeding in respect of an industrial dispute, the employer may, in accordance with standing orders applicable to a workman concerned in such dispute or, where there are no such standing orders, in accordance with the terms of the contract, whether express or implied, between him and the workman -
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> (a) alter, in regard to any matter not connected with the dispute, the conditions of service applicable to that workman immediately before the commencement of such proceeding; or
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> (b) for any misconduct not connected with the dispute, discharge or punish, whether by dismissal or otherwise, that workman:
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> Provided that no such workman shall be discharged or dismissed, unless he has been paid wages for one month and an application has been made by the employer to the authority before which the proceeding is pending for approval of the action taken by the employer."

7. By virtue of the provisions of sub section (2) of Section 33 the employer may in accordance with the applicable standing orders during the pendency of “any such proceeding” in respect of an industrial dispute or where there are no standing orders in accordance with the terms of the contract in respect of “a workman concerned in such dispute” alter the conditions of service in a matter not connected with the dispute or punish for misconduct not connected with the dispute that workman. The proviso lays down the conditions precedent to such an action. The expression “any such proceeding” refers to a proceeding of the nature described in sub section (1) of Section 33 which covers proceedings in conciliation pending before a conciliation officer or a board or any proceeding before an arbitrator, Labour Court, Tribunal or National Tribunal. In order to attract the provisions of sub section (2) of Section 33 such a proceeding ought to be pending in respect of an industrial dispute. The employer is empowered to take certain action in respect of “a workman concerned in such dispute”, in respect of the matters stipulated in clauses (a) and (b) and subject to compliance with the conditions prescribed in the proviso. The object of the provisions of Section 33 is to protect the workman against victimization and unfair labour practice by the employer

during the pendency of the industrial dispute and the proviso thereto which requires that an application be made by an employer to the authority before which the proceeding is pending for approval of the action taken by the employer is designed to achieve the purpose. In **Jaipur Zila Sahakari Bhoomi Vikas Bank Ltd. v. Shri Ram Gopal Sharma**[1] a Constitution Bench of the Supreme emphasised the object and purpose of the legislature in enacting the provisions contained in Section 33. The Supreme Court held that if an employer desires to take the benefit of the provision for passing an order of discharge or dismissal, he has to also assume the burden of discharging the statutory obligation placed on him by the proviso. Compliance with the proviso was therefore held to be a mandatory requirement. Where an application is made for an approval of the action taken by the employer, the authority before whom the proceeding is pending has to examine whether the order of dismissal or discharge is bonafide, whether it was by way of victimization or unfair labour practice and whether the conditions contained in the proviso were complied with. If approval is refused, the consequences would be as if the order of dismissal or discharge had never been passed.

1 2002 I CLR 789.

The order of dismissal or discharge passed while invoking Section 33(2)(b) brings an end to the relationship of employer and employee but the order would remain incomplete and inchoate subject to the approval of the authority. Hence, it is only when the authority grants its approval that the relationship de jure would come to an end.

8. Now in the present case, the Association of Chemical Workers had entered into a settlement on 27th January, 1986 and later upon the expiry of the settlement on 8th August, 1990. The settlement of 8th August, 1990 prescribed the conditions of service of Medical Sales Representatives. On 29th June, 1992 the Association of Chemical Workers expressed its intention to terminate the settlement and serve a fresh charter of demands. Conciliation proceedings not having resulted in an agreement, a reference (Reference IT 55 of 1995) was made to the Industrial Tribunal for adjudication by an order dated 25th September, 1995. The reference to the Industrial Tribunal was eventually disposed of by an award dated 5th July, 2005, a copy whereof has been placed on the record of these proceedings. As noted above one of the contentions of the management in these proceedings is that the

Respondent workman had ceased to be a member of the Association of Chemical Workers from which he resigned on 25th April, 1995. The evidence in that regard would be considered shortly hereafter. But a considerable degree of light is thrown on the circumstances which obtained in the establishment of the Petitioner by the final award of the Industrial Tribunal dated 5th July, 2005 in reference IT 55 of 1995. In the proceedings before the Tribunal it emerged in the course of the evidence that in the year 1994 the Medical Sales Representatives employed by the Petitioner had entered into individual contracts providing for an upward revision in their conditions of service. Some time in the year 1997 a union by the name of Novartis Employees Union was formed and all the Medical Sales Representatives resigned en mass rendering the Association of Chemical Workers a defunct union. Bilateral settlements were thereafter entered into between the management and the newly formed union, the last of them being on 18th November, 2004. In this backdrop when the reference came up for adjudication before the Tribunal, the Tribunal noted that not a single employee in the category of Medical Sales Representatives continued to be a member of the Association of Medical Workers which had no membership at all

amongst such employees. During the course of adjudication not a single Medical Sales Representative could be examined by the union in support of its case. In this background, the Tribunal proceeded to dismiss the reference holding that the grievance of the employees had been settled with the management. The Tribunal observed as follows :

> "But when it has been specifically submitted on behalf of the first party company that no employee (MR) is continued to be the member of the Association and it has no membership at all amongst such employees, it was for the second party Association to bring some evidence in that behalf. None of the employee (MR) or any witness who is concerned with the dispute in reference, has been examined. In these circumstances, I do find substance in the submissions made on behalf of the first party company that none of the employee (MR) has attended the proceeding any time as they had now no interest therein, having individually settled the terms of service conditions with the first party company."

9. Hence, while the Tribunal was of the view that the locus of the Association of Chemical Workers to present a charter of demands or to raise a dispute could not be questioned, it was abundantly clear that the union had failed to establish that the employees had continued with the union even thereafter. The award of the Industrial Tribunal dated 6th July, 2005 has attained finality.

10. It is in this background that the evidence of the workman on the question as to whether he had continued to be a member of the Association of Chemical Workers must be assessed. During the course of his cross examination the workman was confronted with his letter dated 25th April, 1995, purporting to resign from the Association of Chemical Workers. The workman did not deny his signature on the letter and accepted that it had also been signed by two other employees. The case of the workman, however, was that it was signed under compulsion or force exerted by the management. Apart from a bare statement to that effect the evidence of the workman is bereft of any material particulars whatsoever that would substantiate the allegation of duress. The workman stated that the letter was not forwarded to the union, but when cross examined further stated that he was unable to recall whether after the execution of the letter he had written a letter either to the management or to the Association of Chemical Workers withdrawing or cancelling his resignation from the membership of the union. There is merit in the submission which has been urged on behalf of the Petitioner that if the case of the workman was that he continued to be a member of the Association

of Chemical Workers, the best possible evidence was in regard to the payment of the membership subscription or the dues of the union. No material of any such kind was produced. The evidence would show that (i) five months prior to the date of the reference the workman had resigned from the membership of the Association of Chemical Workers; (ii) the letter of resignation was admittedly signed by the workman; (iii) no letter withdrawing the resignation was forthcoming and (iv) there was no proof of coercion or duress whatsoever. Indeed the contention of the workman that he was forced to resign from the membership of the union would have to be assessed from the stand point of the position that the Association of Chemical Workers had lost its membership in the Petitioner in the category of Medical Sales Representatives and that the workmen had as a large body resigned from the union. That is why, when the main reference came up before the Tribunal not a single workman in the category of Medical Sales Representative could be produced by the union to substantiate the demands raised by the union in the reference. The Tribunal was therefore constrained to observe that the workmen had no interest in the pending reference having individually settled their conditions of service with the management.

11. There can be no dispute about the position in law that in order to attract the applicability of Section 33(2)(b), the workman in question must be concerned in the dispute which is pending in conciliation or before the Labour Court or Tribunal. In a case such as the present, where the union which had espoused the industrial dispute had lost its membership of the entire body of workman whose cause was sought to be represented and the workmen themselves have joined in the formation of a new union which resulted in a settlement with the management, there can be no gain saying the fact that the workman cannot be regarded as being concerned in such dispute. 'Concerned in such dispute' would mean concerned in the dispute raised by the union which has set forth the demands which eventually led to an order of reference. The material on the record shows that the Association of Chemical Workers had not even a single member from the category of Medical Sales Representatives. No Medical Sales Representative was therefore concerned with the dispute which was sought to be raised by the Association of Chemical Workers. The Industrial Tribunal has manifestly failed to consider material aspects of the evidence before it. The admissions of the workman

during the course of the cross examination have manifestly been ignored. The finding of the Industrial Tribunal that there was a breach of Section 33(2)(b) of the Industrial Disputes Act, 1947 will therefore warrant the interference of this Court in the exercise of the jurisdiction under Article 226 in order to correct a miscarriage of justice. The Petition is accordingly allowed by quashing and setting aside the order of the Industrial Tribunal dated 30th June, 2005. Rule is

made absolute in terms of prayer clause (a). In the circumstances of the case there shall be no order as to costs.

In view of the disposal of the Petition, the Notice of Motion shall stand disposed of.